IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DAVID H. BROWN, P. JAMES HAHN, KATHRYN A. PINCUS, SUSAN W. SOLTYS and BRIAN WONG,	)	
Petitioners,	)	C.A. No. 06A-10-005-JRS
v.	)	
CITY OF WILMINGTON ZONING BOARD OF ADJUSTMENT, being DAVID BLANKENSHIP, HAROLD LINDSAY and MARK PILNICK,	)	
Respondents.	)	

Date Submitted: May 24, 2007
Date Decided: June 25, 2007

MEMORANDUM OPINION

Upon Respondents' Motion to Dismiss.
DENIED.
Upon Petitioners' Motion to Amend
Caption of Petition for Writ of Certiorari.
GRANTED.

Jeffrey S. Goddess, Esquire, Rosenthal, Monhait & Goddess, Wilmington, Delaware, Attorney For Petitioners.

Alex J. Mili, Jr., Esquire, City of Wilmington Law Department, Attorney for Respondents.

SLIGHTS, J.

I.

In this opinion, the Court considers a motion to dismiss a petition for writ of *certiorari* for failure to join a necessary party as required by Superior Court Civil Rule 19 ("Rule 19").[1] David H. Brown, P. James Hahn, Kathryn A. Pincus, Susan W. Soltys, and Brian Wong ("Petitioners"), have petitioned the Court for a writ of *certiorari* ("the Petition") to review a decision of the City of Wilmington Zoning Board of Adjustment (the "ZBA" or "Respondent") granting a zoning variance to CCS Investors, LLC ("CCS"). Respondent moves the Court, pursuant to Superior Court Civil Rule 12(b)(7), to dismiss the Petition with prejudice for failure to join two necessary parties, Preservation Delaware, Inc. ("PDI") and CCS, the owner and the prospective developer of the property at issue, respectively.[2] In support of its motion, Respondent relies upon Rule 19 and *Hackett v. Board of Adjustment of Rehoboth Beach,* a decision of the Supreme Court of Delaware which, according to the Respondent, controls the disposition of its motion.[3]

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[1] *See* SUPER. CT. CIV. R. 19 ("Rule 19") (governing joinder of persons needed for just adjudication).

[2] Docket Item ("D.I.") 3, Resp. Mot. Dismiss. *See also* SUPER. CT. CIV. R. 12(b)(7) (providing that a party may move to dismiss a claim for failure to join a party under Rule 19).

[3] *Hackett v. Bd. of Adjustment of the City of Rehoboth Beach*, 794 A.2d 596 (Del. 2002). Because the Court will discuss both the Superior Court and Supreme Court decisions in *Hackett* at length in this opinion, for ease of reference, the Court will designate the Superior Court decision as "*Hackett I*" and the Supreme Court decision as "*Hackett II*."

Petitioners oppose the motion to dismiss and ask the Court to grant their motion to amend the caption of the Petition by adding CCS and PDI as parties.[4] Petitioners argue that *Hackett II* does not mandate dismissal on the facts presented here and that they have complied with both 22 *Del. C.* § 328 ("Section 328"), governing *certiorari* appeals from a Municipal Zoning Board to the Superior Court, and Superior Court Civil Rule 72 ("Rule 72"), governing appeals from all administrative boards.

The Court finds that *Hackett II* is controlling and compels a finding that the Petitioners have failed to join a necessary party to this *certiorari* appeal. Nevertheless, the Petitioners' proffered amendment to their Petition meets the "relation back" criteria set forth in Delaware Superior Court Civil Rule 15(c). Accordingly, Respondent's Motion to Dismiss must be **DENIED** and Petitioners' Motion to Amend the Caption of the Petition for Writ of *Certiorari* must be **GRANTED**.

II.

In May 2006, CCS and PDI submitted an application to the ZBA for a zoning variance to develop the property located at 1301 Greenhill Avenue, otherwise known as the Gibraltar Estate ("the Estate").[5] The variance application lists CCS as the

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[4] D.I. 7, Pet. Ans. Br. and Mot. to Amend.

[5] D.I. 10, Appx. Resp. Reply Br., Tab B.

applicant for the variance and PDI as the owner of the property.[6] CCS sought to convert the Estate into offices and to construct an additional free-standing building for office use and parking.[7]

On August 9, 2006, the ZBA held a public hearing during which it heard testimony in support of and opposed to the variance application.[8] After the hearing, the ZBA granted the variance by a 2-1 vote. A written decision followed on September 12, 2006.[9] In its decision, the ZBA granted CCS the right to convert the Estate for office use and to construct a new 10,000 square foot office building adjacent to the Estate home.[10] The ZBA granted the application upon concluding that the development of the property would not "adversely affect the character of the neighborhood" and that "circumstances of hardship or exceptional practical difficulty" would exist if the owner was forced to maintain the Estate under the existing zoning designation.[11]

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[6] *Id*.

[7] *Id*.

[8] D.I. 7 at 4-5.

[9] D.I. 8, Appx. Pet. Ans. Br., Tab 3.

[10] *Id*.

[11] *Id*.

After the ZBA issued its decision, on September 13, 2006, the attorney who represented CCS before the ZBA, Ms. Wendie Stabler, Esq., sent a letter to Mr. Joseph G. DiPinto, Economic Development Director of the City of Wilmington, on behalf of CCS.[12] A carbon copy of the letter was sent to Petitioners' counsel, Mr. Jeffery S. Goddess, Esq. In the letter, Ms. Stabler sought to reopen negotiations between CCS and the City concerning CCS' development plans for the Estate. Ms. Stabler stated: "[W]e received the written decision of the city of Wilmington Board of Adjustment yesterday . . . and are looking forward to obtaining the remaining approvals over the next few months. I did try to reach out to Jeff Goddess but he has not returned my call."[13] She also emphasized the possibility of future negotiations with the City and concluded "we hope we can count on the City's continued support as the project proceeds."[14]

On October 12, 2006, Petitioners, who reside in the vicinity of the Estate, filed the Petition with this Court pursuant to Section 328 seeking review of the ZBA's decision.[15] The Petition named only the ZBA as the respondent in the caption; it did

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[12] D.I. 8, Tab 8.

[13] *Id.*

[14] *Id.*

[15] D.I. 1, Petition for Writ of *Certiorari.*

not name PDI or CCS.[16] The body of the Petition describes the relationship between CCS and PDI, and states that CCS applied for and received the variance, but does not expressly refer to either entity as a "party" to the appeal.[17]

Also on October 12, 2006, counsel for Petitioners, Jeffery S. Goddess, Esq., sent an email to Ms. Stabler attaching the Petition as filed.[18] The filename given to the Petition was "Gibraltar ZBOA appeal (Filed)."[19] The email stated, "Wendie, – Attached is a copy of the appeal (i.e., petition for statutory writ of certiorari) which I filed earlier this afternoon."[20] Thereafter, on October 27, 2006, Petitioners filed a praecipe with the Superior Court Prothonotary requesting that a summons be sent to the Sheriff for service of the Petition upon the ZBA and CCS, in care of its attorney, Ms. Stabler.[21] The ZBA was served on November 13, 2006 and the writ was returned on November 30, 2006.[22] The Sheriff attempted to serve Ms. Stabler on November 6, 2006. Ms. Stabler refused service, however, after advising the Sheriff that she was

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[16] *Id.*

[17] *Id.*

[18] D.I. 8, Tab 5.

[19] *Id.*

[20] *Id.*

[21] D.I. 2, Praecipe.

[22] D.I. 5.

not the registered agent for CCS.[23] On October 31, 2005, the ZBA moved to dismiss the Petition for failure to join PDI and CCS as parties pursuant to Superior Court Civil Rule 12(b)(7).[24]

III.

The ZBA argues that the Petition must be dismissed for its incurable failure to join CCS and PDI as indispensable parties pursuant to Rule 19.[25] According to the ZBA, Petitioners' failure to join CCS and PDI cannot be cured because controlling precedent - - *Hackett II* and *Sussex Medical Investors, L.P. v. Delaware Health Resources Board* ("*Sussex Medical*")[26] - - both addressed nearly identical facts and concluded that dismissal of the petition was the only appropriate disposition under the circumstances.[27] Because PDI and CCS are "affected parties" as defined in *Hackett II*, the ZBA argues that both entities must be named in the caption of the Petition to avoid an incurable jurisdictional defect.[28] The ZBA points out that the Supreme Court

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[23] D.I. 18, CCS Writ Returned.

[24] D.I. 3.

[25] *Id*.

[26] *Sussex Med. Investors, L.P. v. Delaware Health Res. Bd.*, 1997 WL 524065 (Del. Super. Ct. Apr. 8, 1997) ("*Sussex Medical*").

[27] D.I. 11, Pet. Reply Br., at 5-7.

[28] D.I. 3 at ¶¶ 2-4.

in *Hackett II* "carefully considered the sound policy of deciding appeals on substantive merits rather than technical noncompliance with procedural rules," but nevertheless affirmed this court's dismissal of a petition for writ of *certiorari* that did not name a necessary party in connection with an appeal from an administrative agency to the Superior Court.[29]

Petitioners read *Hackett II* differently.[30] They observe that Delaware follows the "modern rule" with respect to the technical requisites of an appeal, i.e., that "courts functioning in an appellate capacity should permit appeals to be decided on the merits, notwithstanding non-compliance with the technical niceties of the appeal procedure."[31] According to Petitioners, the Supreme Court explicitly extended the "modern rule" to appeals brought in the Superior Court in *Silvious v. Conley*.[32]

Petitioners also argue that their Petition cannot be dismissed because they have complied with the requirements of both Section 328 and Rule 72.[33] The Petition satisfies Section 328 because Petitioners timely filed a verified petition with the Court

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[29] D.I. 9, Resp. Reply Br., at 4. *See also Hackett v. Bd. of Adjustment of Rehoboth Beach*, C.A. No. 001-11-001, Bradley, J. (Del. Super. Ct. May 11, 2001) (Motion Tr.) ("*Hackett I*").

[30] D.I. 7 at 10.

[31] *Id.* at 11 (quoting *Hackett II*, 794 A.2d at 598).

[32] *Id.* at 13-14 (citing *Silvious v. Conley*, 775 A.2d 1041 (Del. 2001)).

[33] *Id.*

that clearly set forth the bases for their contention that the ZBA proceeding was legally flawed and its conclusions erroneous.[34] The Petition satisfies Rule 72 because it named the Petitioners, designated precisely the order appealed from, stated the grounds for the appeal, named the Court, and was signed by the appellants' attorney.[35] Petitioners allege that Rule 72 does not require an appellant to name the party or parties against whom the appeal is taken.[36] Petitioners further argue that the official forms published by the Superior Court along with its Civil Rules (provided to litigants on the Superior Court's website) are "misleading, in that both speak of a singular, or

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[34] *Id*. at 6. *See also* 22 *Del. C.* § 328 ("Section 328"):

> (a) Any person or persons, jointly or severally aggrieved by any decision of the board of adjustment, or any taxpayer or any officer, department, board or bureau of the municipality may present to the Superior Court a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the Court within 30 days after the filing of the decision in the office of the board. (b) Upon the presentation of the petition, the Court may allow a writ of certiorari directed to the board to review such decision of the board and shall prescribe therein the time within which a return thereto must be made and served upon the relator's attorney, which shall not be less than 10 days and may be extended by the Court. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the Court may, on application, on notice to the board and on due cause shown, grant a restraining order. (c) The Court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

[35] D.I. 7 at 6-7.

[36] D.I. 7 at 6-8. *See also* SUPER. CT. CIV. R. 72(c) ("Notice of appeal. -- The notice of appeal shall specify the parties taking the appeal, shall designate the order, award, determination, or decree, or part thereof appealed from; shall state the grounds of the appeal; shall name the Court to which the appeal is taken; and shall be signed by the attorney for the appellants.").

solitary defendant in error, and suggest that the solitary entity in the caption should be the board of adjustment."[37] The Petition complies with the published forms by naming the ZBA as the solitary defendant in error.[38] According to Petitioners, this court has held that compliance with the court's forms will satisfy the requirements for practice and procedure in this court.[39]

Finally, Petitioners argue that the facts in *Sussex Medical* (upon which *Hackett II* relies) can be readily distinguished from the facts here. First, unlike this case, *Sussex Medical* did not involve a petition for writ of *certiorari*.[40] Second, the appeal in *Sussex Medical* contained only "bare-bones notice," whereas here the Petition contains a detailed description of the proceedings below and the alleged infirmities.[41] Lastly, Petitioners question the analysis in *Sussex Medical* because the case involved a "captioning matter" that should have been governed by Superior Court Civil Rule

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[37] D.I. 7 at 22.

[38] *Id.*

[39] *Id.* (citing *Gordy v. Preform Bldg. Components, Inc.,* 310 A.2d 893, 897 (Del. Super. Ct. 1973)).

[40] *Id*. at 16-17.

[41] *Id*. at 18-19.

10,[42] not Rules 15 and 19.[43]

IV.

The Court may dismiss a claim for relief under Superior Court Civil Rule 12(b)(7) for failure to join a party pursuant to Rule 19.[44] Rule 19 provides for joinder of persons needed for just adjudication.[45] If a party is necessary for a just adjudication, the Court must dismiss the action for failure to join an indispensable party if the party cannot be joined.[46] Here, the parties dispute whether CCS and/or PDI can now be joined as parties to the Petition.

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[42] *See* SUPER. CT. CIV. R.10(a):

> Caption: Names of parties. -- Every pleading shall contain a caption setting forth the name of the Court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

[43] D.I. 7 at 19-22. *See also* SUPER. CT. CIV. R. 15 ("Rule 15") (governing amendments of pleadings).

[44] SUPER. CT. CIV. R. 12(b)(7).

[45] SUPER. CT. CIV. R. 19(a) ("Rule 19(a)"). "Necessary refers to those absentee [parties] who should be joined in the pending case." 4 JAMES WM. MOORE ET AL, MOORE'S FEDERAL PRACTICE § 19.02(2)(c)(3d. ed. 1999).

[46] SUPER. CT. CIV. R. 19 (b) ("Rule 19(b)"). "[A]n indispensable absentee [party] is a necessary party whose joinder cannot be effected and in whose absence the court chooses to dismiss rather than proceed." 4 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 19.02(2)(d) (3d. ed. 1999). *See also Graham v. State Farm. Mut. Ins. Co.*, 2006 WL 1600949, at *1-2 (Del. Super. Ct. June 12, 2006) (dismissing plaintiff's complaint involving a car accident under Rule 19 because plaintiff did not name another necessary motorist in the action).

V.

The outcome of the motions *sub judice* depends, in large part, upon how the Court reads and applies *Hackett II*. In order to appreciate the full import of *Hackett II*, it is useful briefly to review the development of Delaware law regarding amendments to appellate pleadings. Surprisingly, the jurisprudence on this issue is as plentiful as it is, at times, confusing. From this cavalcade of decisions on the subject, settled standards have emerged that offer clear direction to putative appellants. The disposition of these motions will turn on whether or not there is any room for forgiveness when a *certiorari* appellant fails to comply with the letter of these standards.

A. Prior to *Sussex Medical*, Delaware Courts Readily Allowed Appellants To Amend Appellate Pleadings.

It is well-settled Delaware law that appeals should be decided on the merits rather than "nice technicalities of practice."[47] In *State Personnel Commission v. Howard,* the Supreme Court adopted the "modern rule" that "de-emphasizes the technical procedural aspects of appeals and stresses the importance of reaching and

[47] *See Episcopo v. Minch*, 203 A.2d 273, 275 (Del. 1964) ("[A]ppeals as well as trials should, where possible and where the other side has not been prejudiced, be decided on the merits and not upon nice technicalities of practice.").

deciding the substantive merits of appeals whenever possible."[48] The Supreme Court set forth a two part test to determine whether an appellant's omission of a party in the notice of appeal is fatal: "(1) Such omission in the notice of appeal will not cause the appeal to be dismissed unless the omission is substantially prejudicial to a party in interest; and (2) The burden rests upon the appellant to establish the absence of such substantial prejudice."[49]

Applying this test, the Court held that the appellant's failure to name a party in its appeal from the Superior Court to the Supreme Court did not require dismissal because the appellant successfully invoked the Supreme Court's jurisdiction when he filed the notice of appeal within the statutorily prescribed period.[50] After *Howard*, reviewing courts readily would grant an appellant leave to amend a notice of appeal when the time for filing the appeal had elapsed if the court could exercise jurisdiction

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[48] *State Pers. Comm'n v. Howard*, 420 A.2d 135, 137 (Del. 1980). *See also Weston v. State*, 554 A.2d 1119, 1222 (Del. 1989) (finding that *Howard* should be applied where the amendment sought is minor and/or technical).

[49] *Howard,* 420 A.2d at 137.

[50] *Id.* The Court also noted that the opposing party's interests would be adequately represented even if the appeal were to proceed without the omitted party because the same attorney represented both the named and unnamed parties in the Superior Court proceeding. *Id.*

over the matter and the opposing party would not be prejudiced by the amendment.[51]

The first indication that *Howard* may not apply to appeals brought in lower courts was when the Supreme Court affirmed, without reference to *Howard*, the Court of Chancery's dismissal of an appeal for failure to join a necessary party under its Rules 15 and 19 after the expiration of the prescribed time to perfect the appeal.[52] The Court of Chancery found that the action could not proceed because the unnamed party was an indispensable party to the appeal.[53] Neither the Court of Chancery nor the Supreme Court referenced the *Howard* test when determining that dismissal was appropriate.[54]

Four years later, this court followed suit when it dismissed an appeal for failure to join a necessary party without applying the *Howard* test. After grappling with the issue of whether *Howard* applied to appeals to the Superior Court, this court stated in

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[51] *See Weston*, 554 A.2d at 1120-22 (allowing appellant to amend appeal from Family Court order because appellant's notice of appeal contained a minor error, the original and amended notice of appeal raised the same legal issue, and the State was not prejudiced because it had notice of the appeal; *Di's Inc. v. McKinney*, 673 A.2d 1199, 1203-04 (Del. 1996) (granting appellant leave to amend a petition for writ of *certiorari* to supply a missing verification because the State was not substantially prejudiced when it received timely notice of the appeal).

[52] *Council for Civic Orgs. of Brandywine Hundred Inc. v. New Castle County*, 1993 WL 390543 (Del. Ch. Sept. 21, 1993), *aff'd,*637 A.2d at 826 (Del. 1993).

[53] *Id.* at *7. *See also* DEL. CH. R. 15; DEL. CH. R. 19. The Court notes that Court of Chancery Rules 15 and 19 are identical to Superior Court Civil Rules 15 and 19 except that Court of Chancery Rule 19 has one additional subsection that references Court of Chancery Rule 23.

[54] *See Brandywine Hundred Inc.*, 637 A.2d at 826.

Sussex Medical:

> [W]hile nevertheless guided by the general holding of *Howard* that appellate courts should 'decide the substantive merits of appeals whenever possible,' [this court] concludes that *Howard* does not apply to appeals to the Superior Court. Such application of the *Howard* approach would supersede the analysis otherwise required by Superior Court Civil Rules 15 and 19[.][55]

The court noted that prior Supreme Court decisions "offered no criticism of the Superior Court's application of Rule 15 (in permitting the belated verification) as opposed to, or in addition to, the *Howard* approach."[56] The court concluded that the appellant could not amend its notice of appeal to add the unnamed party after the expiration of the appeal deadline because the circumstances of the case would not satisfy the Rule 15(c) "relation back" standard.[57] The court then dismissed the appeal

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[55] *Sussex Medical,* 1997 WL 524065, at *3.

[56] *Id.*

[57] *Id*. at *12. *See also* Rule 15(c):

> (c)Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by statute or these Rules for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

upon determining that it could not proceed without the unnamed party under Rule 19(b).[58]

In *Trone v. Delaware Alcoholic Beverage Control Comm'n*, this court again dismissed an appeal from an administrative decision for failure to join a necessary party within the prescribed appeal period.[59] The court employed the analysis set forth in *Sussex Medical*, applying Rules 15 and 19, and found that the omitted party could not be joined under Rule 15(c).[60] The court then determined that the action could not proceed in equity and good conscience because the omitted party was indispensable under Rule 19(b).[61]

B. *Hackett II* Establishes A Joinder Standard for *Certiorari* Appeals.

In *Hackett v. Board of Adjustment of Rehoboth Beach* ("*Hackett I*"), several property owners filed a petition for writ of *certiorari* in the Superior Court pursuant

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[58] *Id.*

[59] *Trone v. Delaware Alcoholic Beverage Control Comm'n*, 2000 WL 33113799 (Del. Super. Ct. Dec. 28, 2000), *aff'd*, *Trone v. Delaware Alcoholic Beverage Control Comm'n*, 757 A.2d 1278 (Del. 2000).

[60] *See id.* at *4–7.

[61] *Id.* at *7. *Cf. Preston v. Bd. of Adjustment of New Castle County*, 772 A.2d 787, 789 (Del. 2001) (holding that despite appellant's inability to amend notice of appeal under Rule 15 and 19, unnamed party could be added as a party because it constructively intervened in the appeal); *Ganski v. Sussex County Zoning Bd. of Adjustment*, 2001 WL 282887, at *2 (Del. Super. Ct. Feb. 13, 2001) (granting appellant leave to amend petition for writ of *certiorari* seeking review of a ZBA decision because the defect in the petition was technical and the ZBA would not be prejudiced by the amendment after receiving timely notice of the appeal).

to Section 328 challenging a ZBA decision to issue a building permit to the Sands, a hotel and restaurant.[62] The property owners named only the ZBA in the caption of the appeal and in the praecipe, and did not list the Sands as a "party" in the body of the petition.[63] The property owners mailed copies of the appeal to several parties including the attorney who represented the Sands at the ZBA hearing.[64] Although the attorney for the permit holder received his copy of the notice before the expiration of the thirty-day appeal period, he did not tell his client, the Sands, about it until after the thirty days expired.[65]

Ruling from the bench, this court concluded that correcting the caption was inappropriate because the petitioners gave no indication that they intended the Sands to be a party to the appeal.[66] To the contrary, the petitioners did not direct the Prothonotary to send notice to the Sands as required by Rule 72(c), and the Sands was not asked to participate in a teleconference regarding the briefing schedule or any other proceedings related to the appeal.[67] The court determined that the Sands was a

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[62] *See Hackett II,* 794 A.2d at 597. *See also Hackett I*, C.A. No. 001-11-001 at A120.

[63] *Hackett II*, 794 A.2d at 597.

[64] *Hackett I*, C.A. No. 001-11-001 at A120.

[65] *Id*. at A120-21.

[66] *Id.* at A123-25.

[67] *Id*. at A123-24.

necessary party under Ruler 19(a) and that an amendment under Rule 15(a) could not relate back to the date of the original filing pursuant to Rule 15(c).[68] Specifically, the second and third requirements of Rule 15(c) were not met because there was no notice to the Sands and "no mistake about the identity of the Sands that in any way precluded the appellants from naming the Sands when they took their appeal."[69] Consequently, the court dismissed the action under Rule 19(b) because the petitioner had failed to name a necessary party to the appeal.[70]

In *Hackett II*, the Supreme Court affirmed *Hackett I* and expressly stated that the more lenient "modern view" embodied in the *Howard* test should not be applied when determining whether the failure to name a necessary party in a *certiorari* appeal to the Superior Court creates an amendable defect.[71] The Court held that *Howard*, and the other cases that applied this more lenient approach, did not "address[] the strictures of appeals implicated by the *certiorari* process in the Superior Court."[72] The Court continued:

Judicial review of an administrative proceeding initiated through the

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[68] *Id*. at A126-28.

[69] *Hackett I*, C.A. No. 001-11-001 at A127-28.

[70] *Id*. at A128-30.

[71] *Hackett II*, 794 A.2d at 598.

[72] *Id*.

> *certiorari* process, while the functional equivalent of an appeal, may be subject to specific pleading requirements. One requirement of the *certiorari* proceeding is notice to a party affected by the administrative ruling, either directly or through a designated agent.[73]

Thus, according to *Hackett II*, instead of applying the test set forth in *Howard*, this court must apply Rules 15 and 19 in the manner set forth in *Sussex Medical* to determine whether the omission of a party to the appeal creates an amendable defect.[74]

C. *Hackett II* and *Sussex Medical* Provide the Legal Standard the Court Must Apply To The Motions *Sub Judice*.

The Court is satisfied that the motions *sub judice* must be analyzed within the strict framework established in *Sussex Medical* and adopted by *Hackett II*. The case presently before the Court is factually very similar to *Hackett* because both cases involve *certiorari* appeals to the Superior Court from ZBA decisions under Section 328, both appellants named only the ZBA in the caption of the appeal, omitting the successful applicant below, and both appellants failed to denote the omitted party as a "party" in the body of the petition.[75]

The Court rejects Petitioners' arguments that the more lenient *Howard* standard

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[73] *Id.*

[74] *Id. But see Yellow Cab Delaware, Inc. v. Dep't of Transportation*, 2006 WL 2567677, at *1-2 (Del. Super. Ct. Aug. 29, 2006)(distinguishing *Sussex Medical* and *Hackett II* because the appeal at issue did not concern "the strictures of appeals implicated by the *certiorari* process in the Superior Court" and the unnamed party intervened when it filed a motion to dismiss the appeal)(quoting *Hackett II*, 794 A.2d at 598).

[75] *Hackett II*, 794 A.2d at 598.

and/or the law concerning captioning should be utilized to determine whether CCS can be added as a party. As *Hackett II* makes clear, *Howard* does not apply to *certiorari* appeals. Nor does this case present a simple defect in the caption. The question before the Court is not whether the caption can be corrected so that a previously named party can be properly identified, but whether an entirely new party (PDI and/or CCS) can be joined under Rules 15 and 19 after the expiration of the time for appeal.

Under *Hackett II* and *Sussex Medical*, the Court first must determine whether PDI and CCS are necessary parties to this appeal pursuant to Rule 19(a). If the Court finds that either entity is a necessary party, then the Court must decide whether Petitioners can belatedly join that party by an amendment under Rule 15(a). The amendment to the notice of appeal may "relate back" to the date of the original filing only if Petitioners satisfy the three-prong test set forth in Rule 15(c). If joinder of CCS and/or PDI is not possible, the Court must consider whether it can proceed without the missing party or if it must grant the Motion to Dismiss because the missing party is indispensable pursuant to Rule 19(b).[76]

As noted, *Hackett II* held that *certiorari* appeals to the Superior Court implicate

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[76] *Sussex Medical*, 1997 WL 524065, at *8; *Trone*, 2000 WL 33113788, at *6-7.

certain "strictures."[77] One of these strictures requires the appellant to comply with certain pleading requirements, such as "notice to a party affected by the administrative ruling, either directly or through a designated agent."[78] The Court notes that Petitioners have complied with the pleading requirements set forth in Section 328 and Rule 72. Petitioners satisfied Section 328 by timely filing a verified petition in which they set forth the grounds for their appeal of the ZBA decision.[79] Petitioners satisfied Rule 72 by naming the Petitioners, designating precisely the order appealed from, stating the grounds of the appeal, naming the Court, and signing the Petition.[80] Lastly, Petitioners complied with the official forms published with the Superior Court Civil Rules by naming the ZBA in the caption.[81] Therefore, Petitioners have invoked this Court's appellate jurisdiction.[82] Still to be determined, however, is whether Petitioners have complied with Rules 19(a), 15(a) and 15(c), all of which are applicable to *certiorari* appeals.

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[77] *Hackett II*, 794 A.2d at 598.

[78] *Id.*

[79] D.I. 7 at 6.

[80] *Id.* at 6-7.

[81] *Id.* at 22.

[82] *See Preston*, 772 A.2d at 791 ("In this case, the Writ was filed and verified within the statutory 30-day period and it named the Board as a respondent as required by [9 *Del. C.* § 1314(a)]. We conclude that compliance with § 1314(a) is sufficient to invoke the jurisdiction of the Superior Court.").

1. PDI Is Not a Necessary Party to This Appeal Pursuant to Rule 19(a).

Rule 19(a) states, in pertinent part:

> A person who is subject to service of process and whose joinder will not deprive the Court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

The ZBA argues that PDI is a necessary party to this appeal simply by virtue of the fact that the "variance application itself names both CCS and PDI as the co-applicants."[83] The Variance Application, in fact, lists CCS as the "Applicant" and PDI as the "Property Owner."[84] The next section, under the heading "Variance(s) requested," refers to "Applicant" in the singular.[85] PDI did not participate in the ZBA hearing, nor is it even mentioned once in the ZBA's written decision awarding the variance to CCS.[86] The Court finds these facts sufficient to indicate that PDI is not

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[83] D.I. 9 at 19.

[84] D.I. 10, Tab B.

[85] *Id.* Under the heading entitled "Location of Variance Request," the application states: "Variance(s) requested: *Applicant* seeks a variance to adaptively reuse existing mansion for office space…" *Id.* (emphasis supplied).

[86] D.I. 8, Tab 4.

a necessary party to this appeal because it was not a party to the ZBA proceeding. To the extent PDI has an interest in these proceedings, it would be well-represented by CCS.

2. CCS Is a Necessary Party To This Appeal Pursuant to Rule 19(a).

This court applied Rule 19(a) in *Sussex Medical* when it considered whether to allow an appellant leave to amend an appellate pleading to add an omitted party when appealing a decision of the Delaware Health Resources Board.[87] The court found that the unnamed entities were necessary parties to the appeal because "the disposition of th[e] appeal in the absence of the successful applicants may impair or impede their interests significantly."[88] Like the unnamed party in *Sussex Medical*, CCS has a vested interest in this appeal because any reversal or modification of the ZBA decision would affect its right to develop the Estate in accordance with the variance it has obtained. CCS is a necessary party under Ruler 19(a).

3. Petitioners Can Amend The Petition Under Rule 15 Because They Satisfy Rule 15(c)'s Three-Prong Test.

The thirty-day period for filing and perfecting a petition for writ of *certiorari* under Section 328 has long since expired. Accordingly, the Court must, in its discretion, determine whether the proposed amendment to the Petition to name CCS

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[87] *Sussex Medical*, 1997 WL 524065, at *5.

[88] *Id*. at *6.

should "relate back" to the date of filing of the initial Petition under Rule 15. Rule 15(a), in essence, allows the Court to extend a limitations period or appeals deadline to allow a plaintiff or appellant "to bring in separate entities, not originally named as defendants, and to permit such amendment after the statute of limitations has expired *if* the requirements of Rule 15(c) are satisfied."[89] "The rule directs the liberal granting of amendments when justice so requires. In the absence of prejudice to another party, the trial court is required to exercise its discretion in favor of granting leave to amend."[90] "Rule 15(c) [,however,] neither expands nor contracts the scope of amendments available under Rule 15(a). Rule 15(c) does establish a series of requirements that must be satisfied if the movant wishes to render the amendment effective as of the time of the filing of the original complaint."[91]

Rule 15(c) allows an amendment to a pleading to relate back to the date of filing of the original pleading when the proffered pleading satisfies each of the following three factors:

> [F]irst, the claim asserted in the amended pleading must arise out of the

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[89] *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 263 (Del. 1993)(emphasis supplied)(citations omitted).

[90] *Id.* (citations omitted).

[91] *Id.* ("Notwithstanding the general liberal policy towards amendments imparted by Rule 15, a motion to add or substitute a party after the statute of limitations has run *must be denied* if it fails to satisfy the requirements of Rule 15(c).")(emphasis supplied).

> same conduct or occurrence set forth in the original pleading. Second, the party to be added by the amendment must receive notice of the action within the required statutory period. Finally, Rule 15(c) requires that within the same statutory period, the party to be added to the action knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against the party sought to be added to the pleading.[92]

Here, the first prong of the Rule 15(c) test is satisfied because the Petitioners' proposed amendment relates to the same conduct or occurrence set forth in the original Petition. The conduct or occurrence that is the subject of this proceeding is the issuance of a use variance by the ZBA to CCS. This focus would not change by allowing Petitioners leave to amend the Petition to add CCS as a party.

The Court looks to the time and content of the notice of appeal to evaluate the second, or "notice," prong of Rule 15(c).[93] Specifically, "notice must be given within the period provided by law for commencing the action – and that can only mean the limitations period; as to content, the notice must be given of the institution of the action, and that can only mean the lawsuit, not merely of a claim or allegation."[94] The Court must strictly construe both "the meaning of institution of the action [and] [ ]

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[92] *Preston,* 772 A.2d at 790.

[93] *Mullen*, 625 A.2d at 265.

[94] *Id.*

the time requirement."[95] The Court may, however, liberally construe "the type or quality of the notice…. [S]uch notice…need not be formal[;] … notice by service of process is not mandated, and it may not even have to be in writing."[96]

The parties raise two interrelated issues regarding whether CCS received notice of this appeal within the thirty-day period. The first issue is whether CCS had notice of the institution of this appeal when Petitioners' attorney ("Mr. Goddess") sent an email to the attorney who represented CCS at the ZBA hearing ("Ms. Stabler") indicating that the Petition had been filed.[97] As best as the Court can tell from the record, the Petition without the accompanying praecipe was attached to Mr. Goddess' email.[98] When determining whether this notice is adequate, the Court is mindful of *Mullen*'s direction that notice sufficient to satisfy Rule 15(c) need not be formal - or even in writing.[99] *Mullen* also held that "a party who is notified of litigation concerning a given transaction or occurrence has been given all the notice the statute of limitations are [sic] intended to afford."[100]

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[95] *Id.*

[96] *Id.* (citations and quotations omitted).

[97] D.I. 10, Tab H.

[98] D.I. 9 at 10-1.

[99] *Mullen*, 625 A.2d at 265.

[100] *Id.* (citations and quotations omitted).

The second issue is whether the notice prong of Rule 15(c) is satisfied because CCS was served with notice of this appeal when it was named in the praecipe. According to Petitioner, this fact alone renders *Hackett II* inapposite. In *Hackett,* the praecipe listed only the ZBA. In contrast, Petitioners' praecipe directed that service be made upon the ZBA *and* CCS in care of its attorney.[101]

The resolution of both issues turns on whether notice to the attorney who represented CCS at the ZBA hearing, Ms. Stabler, can be imputed to CCS. The Supreme Court in *Hackett II* stated that notice of the filing of a writ of *certiorari* directed to the attorney who represented the successful property owner in the ZBA hearing was not sufficient notice because "[t]here is no basis in *this record* to impute an ongoing attorney-client relationship between [the property owner's attorney in the ZBA hearing] and [the property owner]. Even if there was, that arrangement, alone, does not create an agency relationship supporting constructive notice in the absence of a prior understanding communicated to the appellant."[102]

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[101] D.I. 8, Tab 4, 9.

[102] *Hackett II*, 794 A.2d at 598-99 (emphasis supplied). *But see Hanley v. City of Wilmington Zoning Bd. of Adjustment*, 2002 WL 1397135 (Del. Super. Ct. June 27, 2002), *aff'd,* 810 A.2d 349 (Del. 2002) (explaining that petitioner appealing a zoning board decision granting a variance filed a praecipe and requested that service be made on the successful property owner care of the attorney who represented him at the board hearing at his business address). In *Hanley*, neither the ZBA nor the property owner asserted that they did not receive notice of the appeal. *Id.*

Hackett II does not hold that notice (in some form) to the attorney who represented the property owner in the ZBA hearing will never satisfy Rule 15(c)'s notice requirement. Indeed, to the contrary, the Supreme Court has held that notice to a party's attorney concerning a legal matter will, in certain instances, provide constructive notice to the party.[103] Agency principles grant the retained attorney the power to act for the benefit of the client and to bind the party in matters relating to the representation.[104] It follows that "notice given to a retained lawyer-agent may be viewed as notice to the client-principal."[105] In *Vance*, the Supreme Court held that an insurer could provide statutory notice to a claimant's attorney because "the insurer here was entitled to rely upon the *disclosed* agency relationship between a retained attorney and a client."[106] The disclosure of the attorney-client relationship is, therefore, crucial in determining whether notice may be given to a party through its

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[103] *See Vance v. Irwin*, 619 A.2d 1163, 1165-66 (Del. 1993) (holding that insurer's obligation to notify a claimant of the statute of limitations under 18 *Del. C.* § 3914 is satisfied when it gives notice to the claimant's attorney). *See also Taylor v. Delagra Corp.*, 1999 WL 167786, at *3-4 (Del. Super. Ct. Feb. 17, 1999) (excusing appellee's delay in filing its motion to affirm an administrative agency decision because appellant failed to send a copy of its notice of appeal and opening brief to appellee's *attorney*).

[104] *Vance*, 619 A.2d at 1165.

[105] *Id.* (citing RESTATEMENT (SECOND) OF AGENCY, § 9(3) (1957)). *But see ITT Hartford Ins. v. State Farm Mutual*, 1997 WL 913497, at *1-2 (Del. Super. Ct. Nov. 13, 1997) (noting that *Vance's* "proposition that notice to an attorney constitutes notice to a client" does not apply to an insurance company's relationship to its insured because there is no agency relationship).

[106] *Vance*, 619 A.2d at 1165 (emphasis supplied).

counsel.

Reading *Vance* in conjunction with *Hackett II*, the Court concludes that *Hackett II* stands for the limited proposition that an appellant may not assume that an ongoing attorney-client relationship exists at the close of an administrative proceeding. If, however, there is evidence that the attorney-client relationship is ongoing *and* "a prior understanding [of that relationship] is communicated to the appellant," notice to counsel will be sufficient to satisfy the notice prong of Rule 15(c).[107]

Unlike *Hackett II*, the Court is satisfied that there is a basis in this record to conclude that CCS received notice of the appeal through its attorney. Ms. Stabler's letter to Mr. Joseph G. DiPinto, dated September 13, 2006, is evidence that Ms. Stabler's representation of CCS continued after the ZBA issued its decision.[108] In the letter, Ms. Stabler identified CCS as her client and proposed continuing discussions on behalf of CCS with the City.[109] Her reference to the ZBA decision and her attempt to contact Mr. Goddess further demonstrate that she intended to represent CCS in "obtaining remaining approvals over the next few months."[110] The letter also provided

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[107] *Hackett II*, 794 A.2d at 599.

[108] D.I. 8, Tab 8.

[109] *Id.*

[110] *Id.*

an "understanding" of the ongoing attorney-client relationship to the Petitioners (through counsel) "prior" to the filing of the Petition.[111] Accordingly, the notice of the appeal provided to Ms. Stabler through Mr. Goddess' email may be imputed to CCS.

Petitioners' praecipe directing service upon CCS, although timely filed, was a superfluous pleading in this instance.[112] Thus, the operative date for purposes of notice is not the date of filing, but the date the document was received by CCS. The praecipe and the pleading it directed to be served were not received by CCS' attorney until after the time for appeal had expired.[113] It cannot, therefore, be a basis upon which Petitioners may argue that CCS received timely notice of the appeal.

The Goddess email to CCS' counsel provided timely notice of the appeal to CCS. Although the praecipe did not provide timely notice of the appeal, as discussed below, the praecipe is relevant to the "mistake" analysis required under the third prong of Rule 15(c).

Turning to the third prong of Rule 15(c), the Court must consider whether CCS

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[111] *Id.* *See also Hackett II*, 794 A.2d at 598-99.

[112] This court has held that a party filing a petition for writ of *certiorari* pursuant to Section 328 need not file a praecipe because "[Section 328] requires only the filing of a petition seeking a writ of *certiorari* and because the statute does not call for the issuance of a writ of *certiorari* until after the Court acts upon it." *Coastal Resorts Properties, Inc. v. Bd. of Adjustment of the City of Rehoboth Beach and the City of Rehoboth Beach*, 558 A.2d 1105, 1108 (Del. Super. Ct. 1988). An appellant who properly initiates its appeal under Section 328 need only submit an order for the Court's signature directing the issuance of a writ of *certiorari* for the action to proceed. *Id.*

[113] D.I. 18.

"knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against" CCS.[114] This requirement ensures that "a legitimate legal claim [is] not squelched" simply because a party makes a mistake in identifying the defendant.[115] Under the third prong, the Court must first consider whether Petitioners "were mistaken as to the identity of the proper party."[116] If the Court finds a "mistake," then the Court must inquire whether CCS knew or should have known of the mistake.[117] When addressing the second part of the inquiry, "the Court should 'focus on the new party's appreciation of the fact that the failure to include it in the original [petition for writ of *certiorari*] was an error and not a deliberate strategy.'"[118]

There are two general approaches to defining a mistake under Rule 15(c). The first is the liberal approach pursuant to which the court will find a mistake "whenever a party who may be liable for the actionable conduct alleged in the Complaint was

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[114] Rule 15(c)(3)(B).

[115] 3 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 15.19(3)(d) (3d. ed. 1999).

[116] *Trone,* 2000 WL 33113788, at *5.

[117] *Mullen*, 625 A.2d at 265.

[118] *Johnson v. Paul's Plastering, Inc.*, 1999 WL 744427, at *2 (Del. Super. Ct. July 30, 1999) (quoting 3 MOORE'S FEDERAL PRACTICE, § 15.19(3)(d) (3d. ed. 1999)).

omitted as a party defendant."[119] Courts that adopt the liberal approach will find a mistake in cases where the plaintiff misnamed or misdescribed the original defendant (otherwise known as misnomer) and where the plaintiff selected the wrong defendant.[120] The second approach is the "strict approach." Under the strict approach, a mistake under Rule 15(c) occurs when the party makes "a true mistake concerning the identity or name of the proper party."[121] An amendment will not relate back where the plaintiff "merely chose the wrong party to sue. The reasoning of these cases is that in the absence of a mistake by the plaintiff, of which the defendant sought to be added was aware, the defendant could assume that he or she was not originally joined for tactical reasons or lack of proof."[122]

Delaware courts follow the strict approach.[123] In *Mancari v. A. C. & S., Inc.*, plaintiffs in the asbestos litigation sought to amend their complaint to add two parties because they did not know that the unnamed entities' products were at their worksites

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[119] *Marro v. Gopez,* 1993 WL 138997, at *2 (Del. Super. Ct. Mar. 31, 1993) (quoting *Williams v. Avis Transp. of Canada*, 57 F.R.D. 53, 55 (D. Nev. 1972)).

[120] 61B AM. JUR. 2D PLEADING § 869.

[121] *Marro*, 1993 WL 138997, at *2. *See also Hess v. Carmine*, 396 A.2d 173, 176 (Del. Super. Ct. 1978) (finding that where "plaintiffs merely seek to correct a 'misnomer,' and the intended defendant is already before the Court, such corrective amendment relates back.")(internal citations omitted).

[122] 61B AM. JUR. 2D PLEADING § 869.

[123] *Marro*, 1993 WL 138997, at *3.

until after the limitations period had run.[124] This court denied the motion to amend because "'[t]here [was] no allegation of misnomer of the defendants, nor [was] there any allegation that defendants mislead plaintiffs as to the identity of the proper party to be sued. Rather, plaintiffs only claim[ed] that they failed to learn they may have had a claim against defendants until after the statute of limitations had run.'"[125]

Later, in *Levine v. New Castle County Vocational-Technical School District*, a plaintiff sought to add parties to a negligence suit after the statute of limitations had run when a deposition revealed for the first time the role the various parties played in causing her injury.[126] This court again denied a motion to amend under Rule 15 because "'there was no mistake as to who the plaintiff intended to name in her complaint . . . There was no reason [for the added defendants] to assume that they would be named as parties defendant.'"[127]

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[124] *Id.* (citing *Mancari v. A. C. & S., Inc.*, C.A. No. 82C-JL-80, Poppiti, J. (Del. Super. Ct. Nov. 1, 1985)(not available on-line)).

[125] *Id.* (quoting *Mancari v. A. C. & S., Inc.*, C.A. No. 82C-JL-80, Poppiti, J. (Del. Super. Ct. Nov. 1, 1985)).

[126] *Id.* (citing *Levine v. New Castle County Vocational-Technical Sch. Dist.*, C.A. No. 81C-AP-14, O'Hara, J., at 506 (Del. Super. Ct. July 20, 1983) (not available on-line)).

[127] *Id.* (quoting *Levine v. New Castle County Vocational-Technical Sch. Dist.*, C.A. No. 81C-AP-14, O'Hara, J., at 506 (Del. Super. Ct. July 20, 1983)).

The Supreme Court refined the mistake concept in *Mullen* when it held: "relation back is not limited to cases of misnomer. It also applies to the addition, removal and substitution of previously uninvolved parties."[128] There, the plaintiff brought a wrongful death action against the corporate seller of a fire alarm system, Alarmguard. Before the statute of limitations ran, the plaintiff took a limited deposition of the president and sole shareholder of Alarmguard to determine if there were additional parties to name in the suit. His wife, vice president and secretary of the company, was present at the deposition. The president testified that his wife was not involved in making decisions regarding the safety components of his company's products. After the statute of limitations had run, the plaintiff learned that the wife was involved in safety decisions and sought leave to amend the complaint to add the wife as a named party.

The Superior Court denied the motion to amend because the "mistake concerning identity" provision of Rule 15(c) "does not apply to a situation where there was a failure to identify a defendant before the statute of limitations ran."[129] The Supreme Court reversed, holding that "the only relevant inquiry is whether the party

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[128] *Mullen*, 625 A.2d at 265.

[129] *Id.* at 266 (citing *Mullen v. Alarmguard*, 1992 WL 302278 (Del. Super. Ct. Sept. 18, 1992)).

to be added knew or should have known of the mistake."[130] The wife knew of the plaintiff's mistake in failing to name her as a defendant before the expiration of the statute of limitations because she was present when her husband mislead the plaintiffs to believe that she was not involved in the safety decisions of the defendant, Alarmguard.

Despite the "somewhat tempered" approach to the mistake analysis endorsed by *Mullen*, this court has been reluctant to stray far from the "strict approach" when defining a mistake under Rule 15(c).[131] For instance, in *Johnson*, the court denied a plaintiff's motion to add a landowner as a defendant after the limitations period expired in a personal injury action arising from a construction site accident. The motion alleged that the landowner was previously "unknown" to the plaintiff.[132] The court rejected this contention and distinguished *Mullen* because the *Johnson* plaintiff knew from the outset of the litigation that the accident occurred on some landowner's premises.[133] Furthermore, even if the landowner was aware of the accident, it was reasonable for the landowner to believe that the plaintiff chose not to name him in the

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[130] *Id.*

[131] *Johnson*, 1999 WL 744427, at *1 ("This strict approach . . . appears to have been somewhat tempered by the Supreme Court's ruling in *Mullen v. Alarmguard*.").

[132] *Id.*

[133] *Id.* at *2.

suit because the plaintiff easily could have ascertained the landowner's identity had he chosen to investigate.[134]

A year later, the court again denied a motion to add a party in *Trone,* where the petitioners named only the Delaware Alcoholic Beverage Control Commission ("DABCC ") in their petition, not the successful license applicant below, Moore Brothers Delaware, Inc. ("Moore").[135] It is unclear whether petitioners attempted to explain their failure to name Moore or whether they offered evidence to show that they intended to name Moore when they filed their initial petition. In any event, this court held, and the Supreme Court affirmed, that petitioners did not make a mistake as to the identity of the proper party because Moore participated in the hearing below, was known to the appellants, and "the identity of the proper party was not difficult to ascertain."[136] Moore "had no reason to believe that there would be any confusion over its identity, and it was not unreasonable for Moore to believe that failure to name it as a party was simply a strategical decision by the [petitioners]."[137]

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[134] *Id.*

[135] *Trone*, 2000 WL 33113799, at *5.

[136] *Id.*

[137] *Id.* at *6.

The common thread connecting all of these cases is that, even while applying the strict approach, the courts focused on the reason the moving party failed to include a party in the complaint or petition to determine whether the failure constituted a "mistake." The courts declined to find a mistake whenever the party could not demonstrate an intent to include the unnamed party before the limitations period expired. In *Trone, Johnson*, *Mancari* and *Levine,* plaintiffs all knew the identities of the putative defendants/respondents at the time they filed suit, yet they did not demonstrate an intent to sue those parties until after the limitations period ran. In contrast, the plaintiff in *Mullen* intended to sue all parties involved in decisions concerning the safety of Alarmguard's products prior to the expiration of the statute of limitations, but was mislead as to the identity of those parties by testimony given by a party defendant at deposition.[138]

Here, the issue is whether a mistake caused by the misleading forms on the Superior Court's website will constitute a "mistake" as to the identity of the proper party under Rule 15(c). Petitioners aver that they failed to include CCS in the caption of the Petition because their counsel was mislead by the model forms provided on the Superior Court's website to believe that only the ZBA should be named as a

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[138] *See also Sussex Medical*, 1997 WL 524065, at *8 (explaining that appellant "has made no allegation that a mistake in identity has occurred").

defendant in error in the caption.[139] They allege that they intended from the outset to prosecute this appeal against both the nominal defendant in error, ZBA, and CCS. And, they maintain that this intent is well documented in the record.

After carefully considering the record and applicable law, the Court is satisfied that Petitioners have complied with Rules 15(a) and 15(c), and have complied with all other procedural requirements for perfecting their appeal and for giving notice to all affected parties. Unlike the appellants in *Sussex Medical, Trone* and *Hackett*, Petitioners have offered evidence of an intent to name CCS as a party to this appeal prior to the expiration of the statutory appeal period in their praecipe, in Mr. Goddess' email to CCS' counsel, and in the Petition itself. Although a praecipe is not required, its function is to direct the Prothonotary to issue a writ "containing with particularity the names of the parties[.]"[140] Petitioners requested service upon both the ZBA and CCS through the praecipe, evincing an intent to name CCS as a party to this appeal. Mr. Goddess' email to Ms. Stabler, sent the same day he filed the Petition, attached a courtesy copy of the Petition as a precursor to formal service. The Petition itself refers to the variance application as the "CCS application" and refers to CCS as the

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[139] *See* "Certiorari Writ, Citation in" and "Certiorari Writ, Sample" *available at* http://courts.delaware.gov/forms/list.aspx?ag=superior%20court.

[140] VICTOR B. WOOLLEY, PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS IN THE LAW COURT OF THE STATE OF DELAWARE, vol. I, ch. VI at 109-110 (1st ed. 1985).

"applicant developer."[141] These references to CCS' interest in the outcome of the appeal indicate an intent to include CCS in the appeal that would challenge the ZBA's decision to grant CCS' application for a variance. Having formed this intent, Petitioner's counsel was then led astray by the Court's forms which clearly (albeit incorrectly) suggest that only the ZBA should be named as the defendant in error.

Based on the foregoing, the Court finds that Petitioner's counsel did not make an "inadvertent mistake" in failing to name CCS in the Petition. He deliberately, but *mistakenly*, chose to name only the ZBA in the caption of the Petition because he reasonably believed that was what this court required. Given the evidence of Petitioners' intent to make CCS a party to this appeal at the time it was filed, the Court is satisfied that Petitioners made a mistake under Rule 15(c)(3)(B) by adhering to the Superior Court forms.

The second element of the mistake requirement is also met because CCS "knew or should have known of the mistake."[142] Mr. Goddess' email to Ms. Stabler attaching the Petition and Ms. Stabler's rejection of Sheriff's service upon CCS as directed in the praecipe demonstrates that Ms. Stabler, on behalf of CCS, "appreciate[d] . . . [that] the failure to include it in the [petition for writ of *certiorari*] was an error and not a

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[141] D.I. 1, ¶¶ 16, 19.

[142] Rule 15(c)(3)(B).

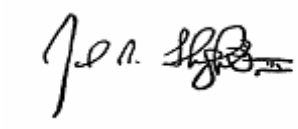
deliberate strategy."[143] CCS should have known of the mistake because it saw that its name was omitted from the caption. Upon receiving the Petition, Ms. Stabler would have recognized that the Petition expressly referred to CCS, its variance application, and that Petitioners sought to challenge the ZBA's grant of that application. Under these circumstances, CCS could not reasonably have believed that Petitioners voluntarily chose not to include it as a party to the appeal.

The Court finds that the addition of CCS through an amendment to the Petition, after the time for appeal has expired, is permissible because the conditions of Rules 15(a) and 15(c) are satisfied. Accordingly, the Court need not address whether CCS is a necessary party under Rule 19(b) because CCS can properly be joined.

VI.

Based on the foregoing, Respondents' Motion to Dismiss is **DENIED** and Petitioners' Motion to Amend Caption of Petition for Writ of *Certiorari* is **GRANTED.**

IT IS SO ORDERED.



Judge Joseph R. Slights, III

Original to Prothonotary

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[143] *Johnson*, 1999 WL 744427, at *2.